No. 55780-1-II

WASHINGTON STATE COURT OF APPEALS
DIVISION II

LORETTA K. WILLIAMS

Appellant,

v.

SURFCREST CONDOMINIUM OWNERS ASSOCIATION, INC.

Respondent.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Appellant Loretta "Etta" K. Williams respectfully requests this Court reverse the Order Granting Summary Judgment and remand for further proceedings. Numerous questions of fact preclude summary judgment dismissal. The Superior Court has misapplied the doctrines of "open and obvious" and "assumption of risk" and summary judgment dismissal is not appropriate in this situation.

II. Respondent Surfcrest Did Owe A Duty To Williams Despite The Alleged Open And Obvious Nature Of The Stairs.

A. Questions Of Fact Exists

The Washington State Supreme Court has recently reiterated the duties owed a business invitee.

> "In the premises liability context with business invitees, we have often applied the standards above [regarding a cause of action for negligence] alongside *Restatement (Second) of Torts* §343 (Am. Law Inst. 1965). *See, e.g. Tincani,* 124 Wn.2d at 138-39; *Wiltse,* 116 Wn.2d at 457. This provision reads:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) Knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) Should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) Fails to exercise reasonable care to protect them against the danger.
>
> RESTATEMENT §343"
>
> *Johnson v. State of Washington Liquor And Cannabis Board,* 98726-2, 2021 WL 1916522 (Wash. May 13, 2021).

In the present appeal, the possessor of land, Respondent Surfcrest, acknowledges subsection (a), they knew the condition of the stairs was dangerous and realized it involved an unreasonable risk of harm. Both the defenses of "open and

obvious" and "assumption of risk" require the respondent to concede an unreasonable risk of harm is present. In addition, there is no evidence, and no argument, the Respondent made any attempt to "exercise reasonable care to protect them [the invitee] against the danger" as required by subsection (c). There is no evidence Surfcrest ever tried to either warn about the conditions, or repair the conditions related to the stairs. The issue on appeal is subsection (b), does a question of fact exist about whether Etta Williams would not realize the danger posed by the stairs, or would she fail to protect herself against the danger?

The uncontroverted opinion of Dr. Gary Sloan is Etta Williams will fail to protect herself against the danger posed by the stairs. CP 205-207. Specifically, Dr. Sloan testified, as the days of Ms. Williams stay at Surfcrest go by, and she continues to use the stairs, "with increased familiarity, you would have a

situation where the person doesn't fully appreciate the risk associated with it." CP 205.

Restatement (Second) of Torts S343A requires the possessor to protect the invitee from known or obvious dangers. This duty is created when Respondent Surfcrest "should anticipate the harm despite such knowledge or obviousness." *Restatement (Second) of Torts §343A(1).*

> "Distraction, forgetfulness, or foreseeable, reasonable advantages from encountering the danger are factors which trigger the landowner's responsibility to warn of, or make safe, a known or obvious danger.

Tincani v. Inland Empire Zoological Soc'y, 124 Wn.2d 121, 139-40, 875 P.2d 621 (1994).

Whether the possessor should anticipate such harm is a question for the jury. *Mavnard v. Sister of Providence,* 72 Wn. App. 878, 884, 866 P.2d 1272 (1994).

Respondent Surfcrest should anticipate their invitees will use these stairs, despite any obvious danger, because it is the only access provided to the second floor of the unit. The

Respondent relies extensively on a comparison to the factual situation in *McDonald v. Cove to Clover,* 180 Wn. App. 1, 321 P.3d 259 (2014). The Court in *McDonald* concludes, "But even viewing all of these facts in the light most favorable to McDonald, he does not establish that the sidewalks were impassible or inaccessible, or the Cove to Clover had reason to foresee that a festival attendee would fail to protect themselves from risks posed by the wet grass on the slight slope where he fell." McDonald at p.7.

The current situation is drastically different then the factual situation in *McDonald.* First, Etta Williams had no alternative route to access the second floor of the unit but for the use of the spiral staircase. Second, Respondent Surfcrest certainly had reason to foresee it's invitees would encounter this dangerous condition, they even encouraged the use of this dangerous condition, by making it the sole access to the second

floor of the unit. There was no alternative route, as was present in *McDonald.*

B. The Danger Was Not Obvious.

Respondent Surfcrest, repeatedly, and mistakenly, asserts the risk to be examined when considering whether it was "open and obvious" is simply the risk of falling down stairs. The Restatement, instead, indicates what is to be considered is the "condition on the land" that caused the physical harm. In in the present situation, the "condition" are the three separate and distinct undisputed complaints regarding these stairs outlined by Williams' experts Baird and Sloan. Specifically, (1) the bottom step was not parallel to the unit's far wall, (2) the color of the bottom step did not contrast enough with the floor, and (3) the steps were not wide enough. *See,* Br. Of App. at 10-11. These are the conditions that should be considered when evaluating whether the condition of the land was open and obvious.

The Court in *McDonald,* concluded the condition of the wet grass on a slight slope was open and obvious because wet grass is easily discernible. There is no evidence in the present case Ms. Williams recognized any of the three dangerous conditions and/or appreciated the risk they entailed. They are certainly much more subtle than wet grass. This is certainly a question of fact that should be determined by the jury.

III. Implied Primary Assumption of Risk Does Not Apply To Ms. Williams' Fall.

There are four varieties of assumption of risk in Washington: (1) express, (2) implied primary, (3) implied unreasonable, and (4) implied reasonable. *Gregoire v. City of Oak Harbor,* 170 Wn2d 628, 636, 244 P.3d 924 (2010). At issue, is solely whether Respondent Surfcrest has evidence to support it's contention of implied primary assumption of risk, a complete bar to recovery.

"Implied primary assumption of risk is shown by the plaintiff engaging in conduct that implies her consent." *Barrett v. Lowe's Home Ctrs., Inc.,* 179 Wn. App. 1, 5, 324 P.3d 688 (2013), citing *Home v. N. Kitsap Sch. Dist.,* 92 Wn. App. 709, 720, 965 P.2d 1112 (1998). "The defendant must establish that "the plaintiff (1) had [knowledge] (2) of the presence and nature of the specific risk, and (3) voluntarily chose to encounter the risk.'" *Id.,* citing *Gregoire,* at 636.

The Court must undertake a two step process for determining the applicability of implied primary assumption of risk. First, the Court must determine what duties respondent Surfcrest owed appellant Etta Williams. Second, the Court must determine whether there is sufficient evidence to establish that Ms. Williams consented to relieve Surfcrest from the obligation of satisfying this duty. As explained in *Alston v. Blythe,* 88 Wn. App. 26, 34-35, 943 P.2d 692 (1997):

Because the plaintiff's consent lies at the heart of both express and implied primary assumption of risk, "it is important to carefully define the *scope*" of that consent. This is done by identifying the duties the defendant would have had in the absence of the doctrine of assumption of risk, and then segregating those duties into (a) those (if any) which the plaintiff consented to negate, and (b) those (if any) which the defendant retained.

These principles mean, among other things, that a trial court may instruct on both contributory negligence and assumption of risk *if* the evidence produced at trial is sufficient to support two distinct findings: (a) that the plaintiff consented to relieve the defendant of one or more duties that the defendant would otherwise have owed to the plaintiff, and (b) that the plaintiff failed to exercise ordinary care for his or her own safety. In most situations, however, the evidence will support only the second of these findings, and "an instruction on contributory negligence is all that is necessary or appropriate."

The record in this case contains no evidence that Alston expressly or impliedly consented to relieve either McVay or Blythe of the duty of ordinary care that he owed to her as a matter of law. She merely tried to cross the street in a way that may or may not have involved contributory negligence, depending on whose testimony the jury chooses to believe. The evidence supported an instruction on contributory negligence, but not an instruction on assumption of risk, and Instruction 13 was erroneous.

Just as with *Alston*, the Court in *Dorr* also concluded that the process for determining whether implied primary assumption of risk applied involved a two part process of first determining the duty and then determining whether there is any evidence to show the plaintiff released the defendant from that duty. *Dorr v. Big Creek Wood Prods.*, 84 Wn. App. 420, 427, 927 p.2d 1148 (1996), citing *Scott v. Pac. W. Mt. Resort*, 119 Wn.2d 484, 500, 834 P.2d 6 (1992), (holding "in determining what risks a plaintiff may be found to have assumed, it is 'essential' first to define what duties the defendant owed.").

A. Surfcrest Owed Etta Williams The Duty To Use Reasonable Care In The Design, Construction And Maintenance Of The Spiral Staircase.

In the present case, all parties agree Etta Williams was a business invitee. The respondent, Surfcrest, owed Ms. Williams a duty of reasonable care. *Younce v. Ferguson,* 106 Wn.2d 658, 667, 724 P.2d 991 (1986). Specifically, Surfcrest

owed Ms. Williams a duty of reasonable care in the design, construction, and maintenance of the spiral staircase.

The question of whether Surfcrest breached their duty of reasonable care in the design, construction, and maintenance of the spiral staircase is a disputed question of fact. The expert opinions of Dr. Sloan and Mr. Baird offered by Ms. Williams contend the Respondent failed to use reasonable care. However, for the purpose of determining whether implied primary assumption of risk should apply, it is not important to determine if respondent breached this duty, only what duty was owed to Ms. Williams.

B. Surfcrest Has No Evidence Etta Williams Consented To Relieving Surfcrest Of Its Duty To Use Reasonable Care In The Design, Construction And Maintenance Of The Spiral Staircase.

After determining the duties owed by Surfcrest, the question becomes "[d]id the plaintiff consent, before the accident or injury, to the negation of a duty that the defendant would

otherwise have owed to the plaintiff?" *Alston,* 88 Wn. App. At 32-33. The respondent has provided no such evidence, and has failed to meet this burden.

In *Dorr*, the court reviewed the record before it and dismissed this same contention as follows:

> Having defined the relevant duty owed by Big Creek as a limited duty to avoid giving misleading and unsafe directions, we now consider whether the jury could have found that Dorr impliedly consented to relieve Big Creek of that duty. Just as the skier in Scott did not assume the risk of operator negligence that creates a hidden hazard, there is no reason to believe Dorr assumed the risk that Knecht would give him a misleading signal. Nothing about Dorr's conduct manifested or implied his consent to release Big Creed from the duty to avoid misdirecting him. That duty therefore remained "as a potential basis for liability."

Id at 430 (quoting *Scott*, 119 Wn.2d at 497) (footnote omitted).

Similarly, the *Alston* court also reviewed the record before it and dismissed this defense as follows:

> The record in this case contains no evidence that Alston expressly or impliedly consented to relieve either McVay or Blythe of the duty of ordinary care that he owed to her as a matter of law. She merely tried to cross the street in a way that may or may not have involved contributory

> negligence, depending on whose testimony the jury chooses to believe. The evidence supported an instruction on contributory negligence, but not an instruction on assumption of risk, and Instruction 13 was erroneous.

Alston, 88 Wn.App. at 34-25.

Also, in *Scott* the court unmistakably held that when there is evidence that "the injury was caused by a combination of the inherent risks of skiing and operator negligence, the doctrine of comparative fault applies." *Scott*, 119 Wn.2d at 502. There, the Supreme Court summarized its determination that only comparative fault applies as follows:

> In sum, [Scott] did assume the risks inherent in the sport (primary assumption of risk) but he did not assume the alleged negligence of the operator. He may nonetheless have been contributorily
> negligent (i.e., in the secondary sense he may have assumed some risk). However, the doctrine of unreasonable assumption of the risk has been subsumed in comparative negligence law. [ ] Any **such contributory negligence would reduce, rather than bar, [Scott's] recovery; this issue remains to be resolved at trial.**

Id. at 503 (emphasis added).

Finally, in *Barrett* 179 Wn. App 1 (2013), the Court reviewed the record and dismissed the assumption of risk defense stating:

> Viewing the facts presented to the trial court at summary judgment in a light most favorable to Barrett, she did not assume the risks created by McDowell negligently unloading the trailer. Arguably, falling freight is an inherent risk of unloading a trailer. But, Barrett's job duties did not include unloading the trailer, and she was not helping to unload when she was injured by the boxes.
>
> Moreover, as the *Scott* and *Kirk* cases demonstrate, the assumption of risk doctrine does not bar recovery for actions caused by the defendant's negligence. Here, there are facts indicating that McDowell was acting negligently by cutting the rope holding the boxes in place. McDowell's alleged negligence was not an inherent risk of Barrett's job.
>
> Additionally, none of Barrett's actions manifest an intent to relieve Lowe's of its duties.
>
> *Id.,* at 12.

Here, just as in *Dorr, Alston, Scott* and *Barrett,* there is no evidence that Etta Williams "assumed the alleged negligence of the operator." Specifically, when the defendant's negligent

acts increase the risks, then the plaintiff is not assumed to have consented to those additional risks. *Barrett*, at p. 78, citing *Scott*, at p. 503. Because no evidence supports Ms. Williams consented to the risks created by this negligently designed, constructed and maintained staircase, the Respondent's claim of implied primary assumption of risk should be reversed.

IV. CONCLUSION

For all of the foregoing reasons, Appellant Etta Williams respectfully requests this Court reverse the order granting summary judgment for Respondent and remand the case for further proceedings in the trial court.

DATED: October 8, 2021

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